No. 85-1626

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of all others similarly situated,

Petitioners,

v.

LUKENS STEEL COMPANY, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC),

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

William H. Ewing
Arnold P. Borish*
Daniel Segal
Gary A. Rosen
HANGLEY CONNOLLY EPSTEIN CHICCO FOXMAN & EWING
1429 Walnut Street, 14th Floor
Philadelphia, PA 19102
(215) 864-7724

Attorneys for Petitioners
*Counsel of Record

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

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The Briefs of the respondent Unions and of *amicus curiae* Equal Employment Advisory Council seem plausible on the surface but lack depth. They skate over the basic meaning of 42 U.S.C. § 1981 ("Section 1981") and this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985). This Brief first addresses the appropriate characterization, for statute of limitations purposes, of claims under 42 U.S.C.

§ 1981, and then treats the issue of the retroactivity of *Wilson v. Garcia*.

I. Claims Under Section 1981 Should Be Characterized, for Statute of Limitations Purposes, as Actions for Tortious Interference with Existing or Prospective Contractual Relations.

A.

The touchstone of the Unions' argument is this Court's observation, in *Wilson v. Garcia*, that 42 U.S.C. § 1983 ("Section 1983") secures "personal rights." 471 U.S. at 278. The Unions assert that Section 1981, too, secures "personal rights," and that it should therefore be characterized in the same way as Section 1983 for statute of limitations purposes—that is, as an action for damages for personal injuries. (Unions' Brief at 14-23.)

In the broadest sense it is true that the rights which Section 1981 was enacted to protect are rights possessed by "persons." But this observation cannot end the characterization inquiry. The rights or interests possessed by "persons" are multi-faceted. For example, an employee who is party to an employment contract has personal contract rights. A parent has personal rights with respect to child custody. Most claims arising from infringements of those rights, however, are not normally called "personal injury" claims; rather, they are called claims for breach of contract or for custody or even *habeas corpus*. Thus, identification of *rights* as "personal" does not go far toward legal characterization of a claim for *infringement* of those rights.

Indeed, the Pennsylvania statutory limitations scheme under review in the present case demonstrates that the broad use of the word "personal" does not, in the Section 1981 context, resolve the characterization dilemma. For while the Pennsylvania limitations provision which the Unions seek to apply (12 P.S. § 34) is directed to "personal injuries," the limitations provision which the District Court applied (12 P.S. § 31) is explicitly captioned "Personal Actions."

As interpreted by *Wilson*, 42 U.S.C. § 1988 ("Section

1988") requires application of the *most* analogous state cause of action, 471 U.S. at 268, so the characterization selected should fit as closely as possible even though a precise fit between the federal claim and the state law analog will rarely be achieved. What must be gleaned from the federal right, if possible, is its dominant aim, both in its original purpose and in its use by litigants.

In *Wilson*, this Court recognized that Section 1983 "only provides a remedy and does not itself create any substantive rights," 471 U.S. at 278, and that the kinds of personal interests for which the Section 1983 remedy had actually been used by litigants were "numerous and diverse." 471 U.S. at 273. This breadth of scope plainly made for difficulty in achieving a narrowly focused characterization. As the Court stated in *Wilson*:

> Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a *general* remedy for injuries to personal rights.

471 U.S. at 278 (emphasis added). Thus the Court chose to analogize the Section 1983 cause of action to a broad, generic category of state tort actions for damages for personal injuries, rather than a specific state cause of action.[1]

---

1. The generality of the "personal injury" characterization chosen in *Wilson* has produced substantial dispute in the lower federal courts over the type of "personal injury" statute which should apply to claims under Section 1983 when state law provides differing limitations periods for different causes of action arising out of personal injuries. *See Preuit & Mauldin v. Jones*, 106 S. Ct. 893, 893-95 (1986) (White, J., dissenting from denial of certiorari); *see also McKay v. Hammock*, 730 F.2d 1367 (10th Cir. 1984) (en banc) (Colorado); *Mismash v. Murray City*, 730 F.2d 1366 (10th Cir. 1984) (en banc) (Utah), *cert. denied*, 471 U.S. 1052 (1985); *Hamilton v. City of Overland Park*, 730 F.2d 613 (10th Cir. 1984) (en banc) (Kansas), *cert. denied*, 471 U.S. 1052 (1985); *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985) (Mississippi), *cert. denied*, 106 S. Ct. 1962 (1986); *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985) (Alabama), *cert. denied*, 106 S. Ct. 893 (1986); *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985) (Ohio), *cert. denied*, 106 S. Ct. 2902 (1986); *Small v. Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986) (Maine); *Saldivar v. Cadena*, 622 F. Supp. 949

Characterizing Section 1981 claims, however, does not involve the same difficulty. As plaintiffs demonstrated in their initial Brief, the *predominant* focus of Section 1981 and its companion 42 U.S.C. § 1982 ("Section 1982") is on the protection of personal *economic* rights. (Brief for Petitioners at 12-19.)

Close analysis of Reconstruction Era legislation in its historical context shows clearly that the Civil Rights Act of 1866 was intended to secure a category of rights which was fundamentally different from those which were the primary goals of later legislation, including the 1871 Act. *See* H. Hyman & W. Wiecek, *Equal Justice Under Law* 395-98 (1982). In the middle of the 19th century, "civil rights were commonly defined, especially by lawyers, as primarily economic. . . ." *Id.* at 299.[2] The 1866 Act, which included present-day Sections 1981 and 1982, was aimed to protect this narrow category of civil rights. *Id.* at 395-98.[3] Thereafter, Congress

(W.D. Wis. 1985); *Cook v. City of Minneapolis*, 617 F. Supp. 461 (D. Minn. 1985); *Saunders v. New York*, 629 F. Supp. 1067 (N.D.N.Y. 1986); *Green v. Coughlin*, 633 F. Supp. 1166 (S.D.N.Y. 1986); *Rodriguez v. Chandler*, 641 F. Supp. 1292 (S.D.N.Y. 1986); *Brandman v. North Shore Guidance Center*, 636 F. Supp. 877 (E.D.N.Y. 1986); *Weber v. Amendola*, 635 F. Supp. 1527 (D. Conn. 1986); *DiVerniero v. Murphy*, 635 F. Supp. 1531 (D. Conn. 1986); *Hobson v. Brennan*, 625 F. Supp. 459 (D.D.C. 1985).

2. *See also id.* at 300: "There were many civil rights. How many, no one knew, although lawyers tended to classify them neatly in terms of primarily economic, contract relationships."

3. The Unions correctly say that the Southern Black Codes included some non-economic prohibitions and that Congress, in enacting the 1866 Civil Rights Act, had some concerns that went beyond the Black Codes. There can be no doubt, however, that the *primary* congressional motivation was to overcome the Black Codes and that the *dominant* theme of those laws, passed by southern state legislatures, was the economic subjugation of blacks. As one commentator has described it:

> Eight Southern legislatures were in session at some time in December 1965. Each addressed itself to the status of the Negro. . . . The Southern States had spoken, and the impact was felt in Congress from the moment it assembled.
>
> In a major aspect, *the problem was economic*.

6 C. Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88*, at 110 (1971) (emphasis added).

moved to a broader definition which included political rights:

> Historical experience demonstrated . . . that Republicans could not rely on the good faith of southern whites or on the self-executing provisions of the 1866 Civil Rights law to provide substantive protections to blacks. Both black spokesmen like Frederick Douglass and white friends among Republicans like Charles Sumner perceived a need for American society to ascend to *a next level of the pyramid* where, they hoped, the whole cluster of rights would finally be self-executing. Section 2 of the Fourteenth Amendment, the various voting provisions of the Military Reconstruction Acts, the Fifteenth Amendment, and the Force Acts were responses to the growing perception of this need for ascent.

Id. at 397 (emphasis added). In the 1870-71 period, "[u]npunished racist violence increased in the South. Congress responded on April 20, 1871, with the 'Ku Klux Klan' Act, enforcing now the Fourteenth Amendment." *Id.* at 470.

The fact that the statutory language of the 1866 Act also extended to certain non-economic interests cannot alter the primacy of the economic content of Section 1981 and its companion, Section 1982.[4] Moreover, the chosen statute of limitations will be applied to actual cases today; *more than ninety percent of all published decisions in Section 1981 cases involve allegations of discrimination relating to existing or prospective contractual relationships*. (Brief for Petitioners at 18.) It does not make sense to characterize these cases as personal bodily injury cases. When the underlying theme and application of a statute is the protection of the right to enter into and maintain economic relationships, the characterization chosen should reflect that theme.

Only by focusing the inquiry on whether the statute is *primarily* directed to personal *bodily* or personal *economic*

4. It is noteworthy that both the Unions and the *amicus curiae* totally ignore Section 1982 in their arguments. The *amicus* brief does not mention it anywhere; the Unions' Brief mentions the existence of Section 1982 only once—in the Counter-Statement of the Case.

interests does the correct Pennsylvania limitations choice become clear. The diversity of the Section 1983 remedy may not have permitted such a narrowly focused characterization, but the more tailored purpose and use of Section 1981 requires that that statute be recognized for what it is—a statute *principally* enacted and used to protect economic rights.[5]

B.

The Unions also argue that the elements of a Section 1981 claim do not precisely track the elements of a tortious interference claim. (Unions' Brief at 27-29.) If this argument were sufficient to reject the tortious interference characterization, the "personal injury" characterization would have been rejected in *Wilson*. As this Court recognized in *Wilson*, "[b]ecause the Section 1983 remedy is one that can 'override certain kinds of state laws,' and is, in all events, 'supplementary to any remedy any State might have,' it can have no *precise* counterpart in state law." 471 U.S. at 272 (emphasis added) (citations omitted).

Similarly, Section 1981 has no "precise counterpart in

5. Even if this Court were to choose a "personal injury" characterization for Section 1981 claims, it would be more appropriate to characterize the provision as one proscribing "intentional, nonbodily personal injuries," rather than simply "personal injuries." *Cf. Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416, 1426-29 (D.C. Cir. 1986) (declining to apply limitations provisions for assaults and batteries, and adopting residual personal injury limitations provision for Section 1981 claims, because, "unlike § 1983, [Section 1981] was *not* designed to provide a remedy" for such torts as assault and battery) (emphasis in original). While plaintiffs urge that a characterization based on interference with economic relationships is the *most* appropriate, a narrowly focused personal injury characterization would be preferable to a generalized personal injury characterization, and would materially aid in avoiding the collateral litigation over the choice among multiple personal injury limitations periods which has plagued Section 1983 limitations selection since *Wilson*. *See* footnote 1 above. Under the Pennsylvania limitations scheme at issue here, intentional nonbodily personal injury claims are governed by the six-year limitations period that the district court applied. Therefore, if the Court adopts this characterization, it should reverse the Court of Appeals' statute of limitations determination.

state law." Nevertheless, Section 1988, as interpreted in *Wilson*, requires application of the *most* analogous cause of action. Because Section 1981 was enacted to protect the right to enter into and maintain economic relationships, the tortious interference analogy fits best.

C.

The Unions argue that a tortious interference characterization would not be appropriate because there are states in which there is no reported case law involving the limitations provision applicable to tortious interference claims. (Unions' Brief at 29-31.)[6] This argument, however, presumes that federal courts are incapable of applying state law—a presumption which is at odds with the experience of the federal courts in exercising diversity jurisdiction. *See generally* 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4507 (1982). Once the appropriate characterization is chosen, there is no reason to believe that federal courts will be incapable of selecting the appropriate state limitations period. American jurisprudence recognized tortious interference claims, especially with regard to employment relationships, before the 1866 Civil Rights Act was passed, *see* W. Prosser, *Handbook of the Law of Torts* § 129, at 929-31 (4th ed. 1971), and the tort plainly has sufficiently widespread application to serve as an appropriate state analog.

Moreover, it is hardly likely that identification of the

6. With respect to six of the states which the Unions listed as having no relevant decisional law (Unions' Brief at 30-31 n.25), there is in fact case law stating the appropriate statute of limitations for tortious interference claims. *See Taylor v. Lenio*, No. 49300 (Ohio Ct. App. June 20, 1985) (LEXIS, Ohio library, Cases file); *Sommer v. City of Dayton*, 556 F. Supp. 427, 434 (S.D. Ohio 1982); *Gibson v. Miami Valley Milk Producers, Inc.*, 157 Ind. App. 218, 299 N.E.2d 631 (1973); *Johnson v. Farmers Alliance Mutual Ins. Co.*, 218 Kan. 543, 545 P.2d 312 (1976); *Bellini v. Thomas*, No. 81C DE 50 (Del. Super. Ct. Oct. 23, 1985) (LEXIS, Del library, Cases file); *Brown v. American Broadcasting Co.*, 704 F.2d 1296, 1303-04 (4th Cir. 1983) (Virginia); *cf. Shinabarger v. United Aircraft Corp.*, 262 F. Supp. 52 (D. Conn. 1966), *aff'd*, 381 F.2d 808 (2d Cir. 1967) (causes of action for intentional torts governed by Connecticut three-year statute of limitations).

applicable state limitations provision for tortious interference will be any more difficult than selection of applicable state limitations provisions for "personal injury claims" has proven in the wake of *Wilson*. As set forth at footnote 1 above, there has been a steady stream of post-*Wilson* litigation, in cases involving Section 1983 claims, over which "personal injury" limitations provision to apply in states where there is more than one such provision.

It is no answer to argue, as the Unions do, that a second round of collateral litigation would be avoided by simply applying the generalized "personal injury" characterization to Section 1981 as well. (Unions' Brief at 31 n.26.) First, it is by no means clear that such a characterization would avoid collateral litigation. *See Banks v. Chesapeake & Potomac Tel. Co.*, *supra*, 802 F.2d at 1428 ("Even if we were to agree with those courts that have concluded that the intentional [personal injury] tort statute should be applied to § 1983 claims, it is far from clear that the same analysis should apply in a § 1981 suit.") (applying residual personal injuries limitations period). Second, the Unions' argument finds no support in the touchstone for limitations selection—the command of Section 1988. That command, as interpreted by this Court in *Wilson*, is to select the *most analogous* state law characterization, not the characterization which is best represented in state court decisions construing statutes of limitations.

D.

The Unions also suggest that establishing a different characterization for Section 1981 and Section 1983 claims may create different limitations periods for claims based on the same underlying facts. (Unions' Brief at 23-24.) Why the Unions think such a result untenable remains unclear, because often throughout the law different limitations periods apply to claims which arise out of a common factual nucleus but are based on differing statutes or common law theories. For example, in the federal context, the same conduct may

violate several different securities statutes, each of which carries a different statute of limitations.[7]

Application of different limitations provisions to different legal claims arising out of the same conduct simply reflects a legislative recognition that the policies underlying selection of limitations periods differ depending on the different elements of the causes of action. Differences between federal claims and between various state law characterizations should be heeded, not ignored, if the command of Section 1988 is to be given meaning.

II. The Uniform Federal Characterization Requirement of *Wilson* Should Not Be Applied Retroactively.

A.

The Unions initially argue that *Wilson* did not decide the characterization, for statute of limitations purposes, of claims under Section 1981, so the present case does not involve the issue of the retroactivity of *Wilson*. (Unions' Brief at 32-37.) This argument misses the point because the Court of Appeals applied retroactively *Wilson*'s novel application of *Section 1988* to require a uniform national characterization. (Pet. App. at A-7 to A-13.)

The Unions themselves state, "[t]he source that led the Court in *Wilson v. Garcia* to require a single uniform characterization of § 1983 claims was 42 U.S.C. § 1988. . . ." (Unions' Brief at 13.) It is the retroactive application of this new principle which the plaintiffs contest in the present case.

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7. Thus, actions for the same fraudulent conduct in connection with the sale of registered securities may be brought under Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k and 77*l*, as well as under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j. The claims under the Securities Act of 1933 would be subject to the limitations provision contained in that act, 15 U.S.C. § 77m, while the claims under Section 10(b) of the Securities Exchange Act of 1934 are subject to the most analogous state limitations period. *Trecker v. Scag*, 679 F.2d 703, 706 (7th Cir. 1982), *cert. denied*, 471 U.S. 1066 (1985).

As plaintiffs demonstrated in their initial Brief, *Wilson* fundamentally revised the principles of limitations selection. This Court's pre-*Wilson* limitations decisions, which had eschewed the need for uniformity and counseled deference to state law as construed by the various courts of appeals, did not presage *Wilson*'s arrival. (Brief for Petitioners at 28-33.) In short, *Wilson*'s construction of Section 1988 was revolutionary, not evolutionary. In the same way that *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which this Court refused to apply retroactively in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), altered the limitations selection rules for claims under the Lands Act, 43 U.S.C. §§ 1331 *et seq.*, *Wilson* substituted a new limitations selection method for claims under the Reconstruction Era Civil Rights Acts.[8]

There is no doubt that it was this new limitations selection methodology which caused the Court of Appeals in the present case to overrule its prior decisions in *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), and *Meyers v. Pennypack Woods Homes Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977). As the Court of Appeals stated:

> As we noted earlier, the *reasoning* employed by the Supreme Court in *Wilson* is inconsistent with the *Polite* approach as used in *Davis* and *Pennypack Woods*. . . . The *rationale* used in *Davis* cannot coexist with *Wilson*, and accordingly does not bind us here.

(Pet. App. at A-13 (emphasis added).) Thus the Court of Appeals made clear that, in its view, *Wilson*'s Section 1988 ruling controlled the outcome of the limitations dispute between plaintiffs and the Unions in the present case.

Indeed, the direct retroactive effect of *Wilson* upon the present case is even clearer than the effect of *Rodrigue* upon the *Chevron* case. *Rodrigue* held that state *substantive* law, rather than federal admiralty law, should govern claims for

8. Neither the Unions nor the *amicus* Equal Employment Advisory Council have taken issue with the fact that *Wilson*'s requirement of uniformity marked a sharp departure from previous Supreme Court rulings.

injuries on off-shore drilling rigs. It did not address statutes of limitations at all. The District Court in *Chevron* held that the *Rodrigue* decision required application of the Louisiana one-year limitations period, which barred the plaintiff's claim. The Court of Appeals for the Fifth Circuit, however, held that the Louisiana one-year limitations statute only barred the remedy but did not extinguish plaintiff Huson's substantive rights under state law. Accordingly, the Court of Appeals held that the limitations statute was procedural rather than substantive. The Court of Appeals then held that *Rodrigue* was not controlling and that federal courts should apply the federal maritime doctrine of laches rather than the state limitations period. *Huson v. Chevron Oil Co.*, 430 F.2d 27 (5th Cir. 1970). The Supreme Court held that the Court of Appeals had erred, but nonetheless affirmed on the ground that the *Rodrigue* decision should not be applied retroactively to bar Huson's claim.

Here the Unions argue that the retroactivity of *Wilson* is not implicated because that case did not deal with Section 1981. By this reasoning, the Supreme Court determination operative in *Chevron* was its decision in *Chevron* itself that Louisiana's one-year limitations period should be applied to claims for injuries on Louisiana off-shore drilling rigs, not the decision in *Rodrigue* that state substantive law applied to such claims. This Court did not view its decision in *Chevron* that way; nor should it view the retroactivity question in the present case from that perspective.

In the present case, the Court of Appeals made clear that it would have affirmed the District Court's limitations determination if it had not felt bound to apply *Wilson*'s new limitations selection rule under *Section 1988* retroactively. (Pet. App. at A-7 to A-8.) Just as this Court declined in *Chevron* to apply *Rodrigue*'s unforeseeable construction of the Lands Act retroactively, it should follow the same course with respect to *Wilson*'s unforeseeable construction of Section 1988.

B.

Although the Unions recognize that one of *Wilson*'s pur-

poses was to minimize collateral litigation, they contend that the courts should continue to make decisions on *Wilson*'s retroactivity on a case-by-case basis. (Unions' Brief at 42-45.) In the present case they argue that because there was no established Third Circuit precedent at the time plaintiffs' cause of action arose or at the time plaintiffs filed suit, there was nothing on which plaintiffs could have relied in waiting to file suit. This argument, however, is inconsistent with both *Wilson* and *Chevron*.

First, the explicit rationale of *Wilson* suggests that there should be one broad retroactivity determination rather than a continuing case-by-case inquiry throughout the lower federal courts, looking at the state of the law in each state and circuit when each pending action was filed. Only such a broad, principled ruling will minimize collateral litigation, as *Wilson* sought to achieve.

Second, the Unions ignore the fact that every court of appeals which had decided the limitations selection issue for Section 1981 claims before plaintiffs filed the present case had applied a characterization which would have fallen within the six-year Pennsylvania limitations provision. (*See* Brief for Petitioners at 42-43 n.29.) These decisions surely served as a reasonable basis for plaintiffs to conclude that the Pennsylvania six-year limitations period would apply.

Finally, the Unions' argument ignores the fact that reliance is involved in only one of the two alternative inquiries posed by the first *Chevron* factor. As this Court held in *Chevron*,

> the decision to be applied nonretroactively must establish a new principle of law, *either* by overruling clear past precedent on which litigants may have relied, *or by deciding an issue of first impression whose resolution was not clearly foreshadowed*.

404 U.S. at 106 (emphasis added) (citations omitted). As set forth in the Brief for Petitioners and above, *Wilson*'s construction of Section 1988 to require a uniform federal characterization, for statute of limitations purposes, was an unforeshadowed departure from earlier statements of this Court and overruled precedent in every circuit except the Tenth Circuit. (*See* Brief for Petitioners at 28-36.) Accordingly, the absence of Third Circuit case law at the time plaintiffs filed suit cannot foreclose the inquiry under *Chevron*.

III. Conclusion.

For the reasons set forth above and in the Brief for Petitioners, this Court should reverse the Court of Appeals' ruling that Pennsylvania's statute of limitations for personal bodily injury claims should be applied to plaintiffs' claims under Section 1981.

Respectfully submitted,

William H. Ewing
Arnold P. Borish*
Daniel Segal
Gary A. Rosen
HANGLEY CONNOLLY EPSTEIN
CHICCO FOXMAN & EWING
1429 Walnut Street, 14th Floor
Philadelphia, PA 19102
(215) 864-7724

Attorneys for Petitioners
*Counsel of Record